

FOR ARGUMENT

Supreme Court, U. S.  
FILED

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MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

\_\_\_\_\_  
No. 75-6933  
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NATHANIEL BROWN,  
*Petitioner,*

v.

STATE OF OHIO,  
*Respondent.*

\_\_\_\_\_  
ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO  
\_\_\_\_\_

**PETITIONER'S REPLY BRIEF**  
\_\_\_\_\_

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**PETITIONER REPLIES TO TWO POINTS  
RAISED IN RESPONDENT'S BRIEF.**

**I.**

The State argues that the record would give no reason for the Lake County prosecuting authorities to contact the Cuyahoga County prosecuting authorities for the purpose of joining or merging the two charges and, indeed, that the record does not reveal any communication. Brief for Respondent, at 2 n.1; 37-39.

The record does contain the complaint in the Willoughby Municipal Court drawn by a member of the Wickliffe Police Department. App. 3. The complaint states that the car is owned by Gloria Ingram and gives her East Cleveland address. The complaint further states that the information in the complaint is based on "...Investigation of the Wickliffe Police Department." App. 3.<sup>1</sup>

The face of the complaint necessarily raises the question of where the Wickliffe Police obtained the information in the first instance that Petitioner was driving Gloria Ingram's car without her consent. Since the investigation included discovering the name and address of the owner, normal police investigation at a minimum would also have easily discovered when and from where the car was originally taken.<sup>2</sup>

## II.

The State argues that joyriding under Ohio Rev. Code 4549.04(D) is not a lesser included offense to auto stealing under Ohio Rev. Code 4549.04(A). The Ohio Court of Appeals explicitly held to the contrary. App. 22.

<sup>1</sup> The word "Wickliffe" in the Appendix is misspelled.

<sup>2</sup> Not of record is the fact that immediately upon Petitioner's arrest the Wickliffe Police contacted the East Cleveland Police. The East Cleveland Police went to the Wickliffe Police Station and within two hours of arrest obtained a confession. The confession admits taking the car from a parking lot in East Cleveland on November 29th, 1973. The State chose not to introduce the confession.

To support its interpretation the State argues that the two charges have different "characteristics" of intent<sup>3</sup> and prohibit different conduct. Brief for Respondent, at 13-14. Respondent cites no case law in support. Rather, it offers two hypothetical illustrations.

The first illustration, purporting to demonstrate different "characteristics" of intent, concerns a defendant who borrows a car which he does not know is stolen but which he paradoxically knows he is not authorized to operate. While operating the car, the defendant does not intend to permanently deprive the owner of possession. Brief for Respondent, at 12. The State uses this illustration to argue the obvious conclusion that the borrowing defendant can only be charged with and convicted of joyriding under Ohio Rev. Code 4549.04(D) and not auto stealing under Ohio Rev. Code 4549.04(A), thereby purportedly demonstrating that the statutes have different "characteristics" of intent.

The State's analysis is incomplete, however. It loses sight of what the original thief can be convicted of. Failing proof of an intent to deprive the owner of possession permanently, the original thief, as well as the borrowing defendant, can be convicted of joyriding under Ohio Rev. Code 4549.04(D). The reason is that a

<sup>3</sup> The State would seem to go farther and argue that intent is not even required under Ohio Rev. Code 4549.04(D). Brief for Respondent, at 11 n.9. The State's argument rests on a misreading of the statute. When read as a whole, the word "purposely" modifies "...without the consent of the owner" and not "...take, operate or keep..." See Ohio Rev. Code 2901.22(A), *eff.* 1/1/74, defining "purposely" under Ohio law prior to January 1st, 1974. See Legislative Service Commission Note to Ohio Rev. Code 2901.22 (1973).

thief who intends to permanently deprive the owner of possession necessarily also intends to deprive the owner of possession for some shorter period of time. It is because of this that joyriding under Ohio Rev. Code 4549.04(D) is a lesser included offense of auto stealing under Ohio Rev. Code 4549.04(A).

The State also argues that the two statutes prohibit different conduct. To support this proposition it offers an illustration of a thief who steals a car with a tow truck. The State concludes that because the thief does not sit inside, turn the ignition and touch the accelerator, he could never be convicted of "... *operating* the automobile without the owner's consent in violation of (Sec. 4549.04(D), Ohio Revised Code)." Brief for Respondent, at 13 (Emphasis added).

The conclusion is based on a misreading of the statute. Ohio Rev. Code 4549.04(D) is written in the disjunctive and, in addition to prohibiting "operating," it also prohibits "taking" and/or "keeping."<sup>4</sup> The Ohio Supreme Court has interpreted statutes of this type to mean that they are violated equally upon commission of any one of the prohibited acts. *Ohio v. Hopkins*, 26 Ohio St. 2d 119, 121-122 (1971). Consequently, the

<sup>4</sup>At page 11 of its brief, the State sets out the elements of Ohio Rev. Code 4549.04(D) citing as authority *Baldwin's Ohio Criminal Law*, 6th Ed., 1973 Cumulative Service, page 36. A review of that citation indicates that excluded from the State's brief are the alternative elements of "take" and/or "keep."

joyriding defendant who hot-wires a car, "takes" that car as surely as Respondent's tow-trucking thief.

Respectfully submitted,



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